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INDIAN LAW

WATER, WATER EVERYWHERE: *U.S. v. ADAIR* KEEPS INDIAN RIGHTS IN FEDERAL COURT

I. INTRODUCTION

In *United States v. Adair*¹ the Ninth Circuit Court of Appeals held that federal court was the proper forum for adjudicating federally reserved water rights even though a state action was in progress on substantially the same issue.² The court also determined the substantive water rights of the Klamath Indian Tribe and its members, of successors to Indian lands and of the federal government.³

In 1975, the United States, on behalf of the Fish and Wildlife Service and the Forest Service,⁴ filed suit in U.S. District Court in Oregon against 600 private landowners for a declaration of the water rights on the former Klamath Indian Reservation.⁵

1. 723 F.2d 1394 (9th Cir. 1983); (per Fletcher, J.; the other panel members were Goodwin, J. and Kilkenny, J.) (as modified on denial of rehearing Jan. 24, 1984) *cert. denied sub nom. Oregon v. United States*, 52 U.S.L.W. 3906 (U.S. June 18, 1984) (No. 83-1735).

2. Pursuant to OR. REV. STATS. §§ 539.010-539.110 (1979), an administrative proceeding was initiated in January 1976 by the Water Resources Department to determine water rights in the Williamson River system. 723 F.2d at 1398-99.

3. 723 F.2d at 1408-17.

4. This is an unusual aspect of the case because the government usually represents the interests of the Indians in water rights suits. In this case, the government owned 70% of the former reservation land and represented the agencies in charge of those lands. 723 F.2d at 1398. Since the Tribe intervened, the conflict of interest issue was not raised. *Id.* at 1407. There was clearly potential conflict between government attorneys arguing on behalf of the agencies claiming as successors-in-interest and government attorneys representing the Tribe arguing for Indian interests. See *Nevada v. United States*, 103 S.Ct. 2906, 2917 (1983) *reh'g denied* 104 S.Ct. 210 (1983).

5. *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979). The Klamath Indian Reservation had been terminated in 1961 pursuant to the Klamath Termination Act of 1954. 25 U.S.C. §§ 564-564w (1982). The Act allowed tribal members to receive cash in exchange for their interest in tribal lands. In order to pay members who chose this option

The district court held that under the terms of the treaty⁶ establishing the reservation the Klamath Tribe possessed reserved water rights for hunting and fishing with a priority date of time immemorial⁷ and water rights for irrigation with a priority date of 1864. Additionally, Indian allottees⁸ were entitled to water rights for irrigation with a priority date of 1864,⁹ subject to the hunting and fishing water rights. The court also held that non-Indian successors¹⁰ were entitled to sufficient water to irrigate acreage actually being irrigated at the time titled passed as well as additional acreage subsequently placed under irrigation. The priority date for both uses was 1864.¹¹ In addition, the district

(1659 out of 2113 members, or 78% of the Tribe) the government sold a large portion of reservation lands. The government and private individuals purchased the lands. The balance of the land was placed in trust with a bank to be managed for the remaining members of the Tribe. In 1958 the government purchased 15,000 acres of forest lands on the former reservation. This purchase extended the Winema National Forest adjacent to the reservation. Since 1893 the government had been withdrawing lands in that area from the public domain in order to establish a national forest. In 1973 the government condemned additional forest lands on the former reservation to add to the Forest. 478 F. Supp. at 340. In 1960 the government bought 15,000 acres of the Klamath Marsh, the heart of the former reservation, to establish a refuge to benefit migrating birds and other wildlife. In 1961 the government made additional purchases of land in order to pay members of the Tribe. In 1973 most of the lands held in trust by the bank were condemned and the balance of the trust lands were sold to private individuals. *Id.*

6. Treaty between the United States of America and the Klamath and Moadoc Tribes and the Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707. Article I of the Treaty secured for the Indians the exclusive right to hunt and fish on the reservation. *Id.*

7. *Id.* Article I recognized rights which predated the Treaty by over 1000 years, and therefore the correct priority date for water rights to support hunting and fishing rights was "time immemorial" rather than the date of the Treaty. 723 F.2d at 1412-14.

8. "Allottees" refers to Indians who received parcels of land pursuant to the General Allotment (Dawes) Act. 24 Stat. 388 (codified at 25 U.S.C. §§ 331-411 (1976)). The purpose of the Act was to convert Indians to an agricultural lifestyle by allotting parcels of reservation lands to heads of families. There was an initial trust period of up to 25 years during which the allottee could not alienate the lands. The Act succeeded in breaking up tribal lands through sales of non-allotted lands to non-Indians and sales and leases by allottees after they received title. At the time of the suit the former Klamath Reservation of 168,000 acres was in the hands of over 600 private landowners, many of whom were purchasers of allotments.

9. The date of priority comes from the 1864 Treaty. 16 Stat. 707. The Indians ceded 12 million acres to the United States government and agreed to reside permanently on 168,000 acres. Under the reserved rights doctrine, the treaty date is the usual priority date for water rights for irrigation because one of the primary purposes of establishing Indian reservations was to encourage development of agriculture. *See infra* notes 37 and 38.

10. This group consisted of purchasers of Indian allotments and of Indian lands sold after termination. *See supra* notes 5 and 8.

11. 478 F. Supp. at 349.

court held that it was unnecessary to separately determine the water rights of the federal government because they were coterminous with Indian rights. The State of Oregon and private landowners appealed and the Klamath Tribe cross-appealed.¹²

II. BACKGROUND

A. *Jurisdiction*

Indians historically have remained free of state court jurisdiction due to their sovereign relationship with the federal government.¹³ However, tension has developed between state and federal interests due to efforts by the states to exercise jurisdiction over various aspects of Indian affairs.¹⁴ Water rights appurtenant to federal reservations have traditionally remained outside the jurisdiction of the states due to the sovereign immunity of the United States.¹⁵ Until 1952 this immunity prevented states from exerting jurisdiction over Indian water rights claims. However, the McCarran Amendment,¹⁶ enacted in 1952, waived

12. The State of Oregon intervened to assert its own rights as alleged owner of approximately 92,000 acres of former reservation lands as well as to support the claims of individual landowners asserting state based rights. 478 F. Supp. at 343.

13. The most basic evidence of this relationship is contained in the Commerce Clause which authorizes Congress to "regulate Commerce with foreign Nations . . . and with the Indian Tribes." U.S. CONST. art. I, §8, cl. 3. The inapplicability of state laws to Indian affairs was first established by the Supreme Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Recent cases upholding that decision include *United States v. Mazurie*, 419 U.S. 544 (1975), *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973), and *Williams v. Lee*, 358 U.S. 217 (1959). See generally FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, ch. 5, (1982) (hereinafter COHEN).

14. "There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 678 (1974). See also Pelcyger, *Indian Water Rights: Some Emerging Frontiers*, 21 ROCKY MTN. MIN. L. INST. 743, 745-51 (1976).

15. It has also been argued that tribal sovereignty barred states from joining Indians in state court actions. According to this view, the McCarran Amendment waives only federal sovereign immunity thus having no effect on the ability of Indians to refuse state court jurisdiction over their water rights claim. However the courts have accepted the view that the United States, not the tribe, holds Indian water rights in trust. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). See text accompanying note 18.

16. 43 U.S.C. § 66 (1976)

Consent is given to join the United States as a defendant in any suit . . . for the adjudication of rights to the use of water of a river system or other source, or . . . for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or oth-

the sovereign immunity defense of the United States to state court jurisdiction in general stream adjudications.¹⁷

In *Colorado River Water Conservation District v. United States*,¹⁸ the Supreme Court considered whether the McCarran Amendment terminated federal jurisdiction over federal water rights, including Indian water rights. The Court held that the McCarran Amendment did not destroy federal court jurisdiction over water rights and emphasized the general obligation of federal courts to exercise their jurisdiction.¹⁹ However, dismissal of

erwise, and the United States is a necessary party to the suit. The United States, when a party to such suit, shall . . . be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty. . . .

Id. The legislative history of the McCarran Amendment indicates Congress did not intend to address reserved water rights but only federal rights acquired pursuant to state law. The states were primarily concerned with facilitating adjudication of all water rights including those appurtenant to the vast federal landholdings in the West. *Hearings Before Subcomm. of the Senate Comm. on the Judiciary on S.18: A Bill To Authorize Suits Against the United States to Adjudicate and Administer Water Rights*, 82d Cong., 1st Sess. 2-5, 21-22, 46-48, 81, 90 (1951). The reserved rights doctrine was interpreted as limited to Indian reservations, thus posing no question of federally based water rights on other federal lands. Also, as of 1952 there had been only limited litigation of *Winters* rights and limited awards to Indians. See *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939). Despite the lack of Congressional intent to address Indian water rights under the McCarran Amendment, the Supreme Court in *Colorado River* held it applicable to adjudications of Indian rights. See text accompanying notes 18-36.

17. A "general stream adjudication" refers to proceedings to determine the water rights of all users of a particular water source. Limited suits for determination of Indian rights are arguably not within the scope of the McCarran Amendment. 424 U.S. 800, 820 n.26. See also Note, *Adjudication of Indian Water Rights Under the McCarran Amendment: Two Courts Are Better Than One*, 71 GEORGETOWN L.J. 1023, 1024-27 (1983) (hereinafter, *Adjudication of Indian Water Rights*).

18. 424 U.S. 800 (1976). The United States, on its own behalf and that of certain Indian tribes, brought suit in federal court against 1000 water users in Water District 7 in order to determine water rights based on both state and federal law, including reserved rights. *Id.* at 805. Pursuant to the McCarran Amendment, one of the defendants attempted to join the United States in state court proceedings to adjudicate the same issue. The district court granted a motion to dismiss on grounds of abstention. The Tenth Circuit Court of Appeals reversed, holding that abstention was inappropriate and that jurisdiction existed under 28 U.S.C. § 1345 which provides that "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." The Supreme Court reversed the Tenth Circuit and held that while abstention was inappropriate, dismissal of the suit from federal court was permissible.

19. The Court described this duty as "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." 424 U.S. at 817.

the federal action in favor of state proceedings was held proper for reasons of wise judicial administration.²⁰

The Court held that the policies behind the McCarran Amendment were the most important factor favoring dismissal.²¹ The major goal of the legislation was to avoid piecemeal adjudication of water rights.²² This federal policy led the Court to interpret the Amendment as allowing state court jurisdiction over Indian water claims.

The Court also identified certain exceptional circumstances in *Colorado River* which permitted dismissal of the federal suit. If the federal forum was inconvenient for the litigants²³ and there was a lack of progress in the federal suit, compared with the concurrent proceedings in state court,²⁴ then the policies of the McCarran Amendment tipped the balance in favor of a state court adjudication.²⁵

In *Arizona v. San Carlos Apache Tribe*,²⁶ the Supreme

20. *Id.* (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)).

21. 424 U.S. at 819.

22. *Id.* See *supra* note 16.

23. The District Court was located in Denver, 300 miles from the state court. *Id.* at 820.

24. There were no proceedings in District Court beyond the filing of the complaint before the motion to dismiss was entered. *Id.*

25. In addition the Court pointed to the government's participation in state court water rights proceedings in three other water districts in the state. The Court failed to note that none of those proceedings involved Indian water rights. Another factor was the extent to which state water rights were to be adjudicated in the federal suit. The Court implied that federal court was not the ideal forum for those determinations yet expressed no reservations about the ability of the state court to determine Indian water rights and other federal rights. *Id.* at 820. See *supra* note 14.

26. 103 S.Ct. 3201 (1983). This was a consolidation of three Ninth Circuit cases decided by the same panel within three days of each other: *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (1982); *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (1982) and *Navajo Nation v. United States*, 668 F.2d 1100 (1982). In each case either the United States in its capacity as trustee, or the Indian tribes acting on their own behalf, attempted to have Indian water rights in Arizona or Montana decided in federal court. In each case, the Ninth Circuit distinguished *Colorado River* on its facts and reversed federal court dismissals made in favor of state court proceedings. In *San Carlos* and *Navajo Nation*, the Ninth Circuit held that due to disclaimers in the Enabling Act under which Arizona received statehood and the Arizona Constitution, the state could not assert jurisdiction over Indian water claims. 103 S.Ct. at 3209. See also Note, *Northern Cheyenne Tribe v. Adsit: Are State Jurisdictional Disclaimers Still The Indian's Assurance of Federal Jurisdiction?* 13 GOLDEN GATE U.L. REV. 329 (1983).

Court applied the doctrine of *Colorado River* to another Indian water rights case.²⁷ The Court reversed the Ninth Circuit and held that the district court correctly deferred to the state court even though the case concerned federal reserved water rights. The issue concerned whether federal suits brought by Indians and involving only Indian water rights were subject to dismissal in favor of state court proceedings.²⁸

The Court concluded that, due to the policy of avoiding piecemeal litigation expressed in the McCarran Amendment, federal court deferral was proper even when the federal suit was filed by Indians for the limited purpose of determining Indian rights.²⁹ The consolidation of proceedings at the state level furthered the goal of judicial economy. According to the Court, concurrent federal proceedings were likely to be duplicative and wasteful.³⁰ The Court also emphasized that a race to the courthouse to control which forum would resolve the controversy should be avoided.³¹

27. The Supreme Court had previously interpreted *Colorado River* in a case unrelated to Indian water rights. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S.Ct. 927 (1983) the issue was the propriety of a district court decision to stay a federal suit brought under the Federal Arbitration Act out of deference to parallel state litigation. In holding that the district court abused its discretion in granting the stay, the Court emphasized that "the balance [is] heavily weighted in favor of the exercise of jurisdiction." *Id.* at 937.

28. 103 S.Ct. at 3212-13. Also at issue was whether the McCarran Amendment had any effect in states which were admitted to the Union subject to enabling acts in which Congress reserved absolute jurisdiction and control over Indian lands. *Id.* at 3210. Montana and Arizona were admitted under Acts which included such language. Enabling Act of Feb. 22, 1889, § 4, 25 Stat. 677 (including Montana) and Enabling Act of June 20, 1910, § 20, 26 Stat. 569 (including Arizona). The Court held that since the purpose of the McCarran Amendment was to resolve a problem encountered by all states, federal sovereign immunity from state jurisdiction, Congress must have intended it to apply to all states. 103 S.Ct. at 3212.

29. *Id.* at 3215. This reasoning means that in order to gain control over Indian water rights claims filed in federal court, a state could file a general water rights adjudication in state court post-dating the federal suit and the federal court would be obliged to defer. The effect would be to prevent Indians from ever being able to litigate their rights in federal court. The majority recognized this possibility by noting several hypotheticals in which dismissal of the federal action would be inappropriate. *Id.* The fact pattern of *Adair* encompassed a number of elements from those scenarios.

30. *Id.* at 3214. In his dissent, Justice Marshall notes that "exercise of federal jurisdiction here will not result in duplicative federal and state proceedings since the District Court need only determine the water rights of the tribes." *Id.* at 3216.

31. *Id.* at 3214. The Court pointed out that the judgment of either court would ordinarily be *res judicata* in the other.

The Court characterized defense arguments in support of federal jurisdiction favorably³² but found the goal of judicial economy outweighed all other concerns.³³ The potential inhospitability of state proceedings to Indian claims,³⁴ and the traditional freedom from state interference enjoyed by Indians³⁵ were two concerns subordinated to the goal of judicial economy.³⁶

B. *Water Rights*

Federal water rights derive from a separate doctrine than either the riparian rights system³⁷ common in Eastern states or the prior appropriation system³⁸ which governs the arid West.³⁹ In *Winters v. United States*,⁴⁰ the Supreme Court first enun-

32. *Id.* at 3213.

33. The majority emphasized the McCarran Amendment policies as determined in *Colorado River* rather than the "exceptional circumstances" test for justifying dismissal. That test had recently been upheld in *Moses H. Cone Memorial Hospital*. See *supra* note 27.

34. In his dissent Justice Stevens cites a number of sources which support the view that the expectation of inhospitable treatment by state courts is well founded. 103 S.Ct. at 3219 n.8, (Stevens, J. dissenting). See *Adjudication of Indian Water Rights*, *supra* note 17, at 1053-54.

35. See *supra* note 14.

36. The dissent noted that since Indian reserved rights derive from a federal base, those rights would necessarily take priority over state created water rights. Therefore, separate adjudication of those federal rights would not necessarily be inefficient. 103 S.Ct. at 3217-18 (Stevens, J., dissenting). Stevens stated that, "the state court will incorporate these claims—like claims . . . that have been formally adjudicated in the past—into a single inclusive, binding decree for each water source." *Id.* at 3218. See also 424 U.S. at 824 (Stewart, J., dissenting).

37. Under the riparian rights system the right to water is an incident of landownership which may not be forfeited by non-use or abandonment. The quantity is limited only by the necessity of sharing the same source with other landowners. In times of shortage, water is shared on a pro rata basis. 1 WATERS AND WATER RIGHTS § 51.1 (R. CLARK, ed., 1967) [hereinafter cited as CLARK.]

38. To claim water rights under the doctrine of prior appropriation, one must have been the first to beneficially use and/or divert a specific quantity of water. The right can be forfeited by non-use or abandonment. When shortages occur, the earliest (senior) users receive their full appropriations while later (junior) users receive what is left. CLARK, *supra* note 37, at § 51.9. The first judicial recognition of the doctrine occurred in *Irwin v. Phillips*, 5 Cal. 190 (1855), in which the California Supreme Court held the riparian system inapplicable to the mining settlements of the West.

39. There are exceptions to this doctrine because several Western states have a combination of semi-arid and humid conditions. These states, including Oregon the site of *Adair*, have hybrid statutory systems in which both riparian and appropriation principles are applied. See CLARK *supra* note 37, at § 51.

40. 207 U.S. 564 (1908). In this case, Montana had allowed private non-Indian landowners upstream from the Fort Belknap Reservation to appropriate and dam water from the Milk River under the state permit system. Heavy upstream use left inadequate supplies for the agricultural needs of the Assiniboine Indians.

cated the doctrine of Indian reserved water rights. The Court held that the agreement⁴¹ establishing the reservation impliedly reserved the right to sufficient water to irrigate reservation lands.⁴² A priority date of 1888 was assigned to the right, making it superior to the rights of non-Indian users who acquired their rights pursuant to state law.

By using the date of the agreement rather than the date of actual appropriation, the Court established the most significant element of the reserved water right. The rights were not based on actual use, but rather vested at the time lands were reserved for a particular purpose. This was an exception to the federal policy of recognizing state law as controlling water rights in non-navigable streams.⁴³

The next issue adjudicated by the Supreme Court was whether individual Indian allottees⁴⁴ and assignees⁴⁵ had a right to any portion of the water rights reserved for irrigation. In *United States v. Powers*,⁴⁶ the Court held that in order to fulfill the purpose of the reserved rights doctrine, the water must ben-

41. The Fort Belknap Reservation was established by agreement rather than treaty. 25 Stat. 124 (1888).

42. 207 U.S. at 576. According to the Court, the intention of the government in establishing the reservation was to convert the Indians from a "nomadic and uncivilized people" to a "pastoral and civilized people." *Id.* Agriculture was considered an integral part of this process, and thus the waters were reserved for irrigation purposes.

43. Desert Lands Act of 1877, 43 U.S.C. § 321. Controversy surrounds the basis of the reserved rights doctrine. One view holds that the Indians reserved all rights not specifically granted to the United States in treaties, including the right to sufficient water to develop reservation lands. The other view holds that the United States in its capacity as trustor, reserved water for Indian reservations at the time the lands were reserved. Under the first view, Indian water rights are aboriginal and date from time immemorial. Under the second view the rights were created by the United States at the time the reservation was established. COMPTROLLER GENERAL OF THE UNITED STATES, RESERVED WATER RIGHTS FOR FEDERAL AND INDIAN RESERVATIONS: A GROWING CONTROVERSY IN NEED OF RESOLUTION, 59 (1978). In *Adair*, the court examined the issue by separating the purposes for which water had been reserved. 723 F.2d at 1419.

44. *See supra* note 8.

45. By the time the allotment program ended in 1934 pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1983), many Indians had sold or leased their allotments. Questions arose as to the extent of water rights available to their Indian and non-Indian successors.

46. 305 U.S. 527 (1939). The United States brought this suit on behalf of the Crow Indian Tribe in Montana. The government sought to stop all upstream diversion of water by non-Indian purchasers of Indian allotments. A drought from 1931-1934 so depleted the water supply that the diversions by non-Indians left no water for a reservation irrigation project.

efit all tribal members equally.⁴⁷ Indian allottees and assignees possessed a right to the reserved waters.⁴⁸ The Court did not quantify or define the precise nature of allottees' rights. Nor did the Court address the underlying issue which was the extent to which non-Indian successors to allotted lands could benefit from the reserved waters.

In *United States v. Ahtanum Irrigation District*,⁴⁹ the Ninth Circuit held that non-Indian successors possessed water rights equal to those of Indian allottees.⁵⁰ This meant that non-Indians became competitors with the Indians for unappropriated waters reserved to benefit Indians. The court reasoned that the Indians would benefit because their allotments could be sold or leased at a higher value with appurtenant water rights.⁵¹

In *Colville Confederated Tribes v. Walton*⁵² the Ninth Circuit denied the effectiveness of state water permits held by a non-Indian purchaser of Indian allotments.⁵³ The non-Indian purchaser was only entitled to a right to water being used for irrigation at the time title passed plus water for land irrigated within a reasonable time after title passed.⁵⁴ Also, unlike Indians, the court noted that non-Indian successors could lose the

47. *Id.* at 532. The Court stated: "[U]nder the Treaty of 1888 waters within the Reservation were reserved for the equal benefit of tribal members." *Id.*

48. *Id.* the Court also noted: "[W]hen allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of the tribal waters essential for cultivation passed to the owners." *Id.*

49. 236 F.2d 321 (9th Cir. 1956). The Yakima Tribe challenged the diversion by white settlers of water to which the Indians claimed reserved rights. In 1908, the Secretary of Interior entered into an agreement with the settlers which granted them 75% of the water of Ahtanum Creek. At that time the Indians were only irrigating 1200 acres. The defendants argued that Indian water rights were limited to their actual beneficial use as of 1908 even though an irrigation project had quadrupled the irrigable acreage by 1915. The court reluctantly held that the Secretary acted within his powers in making the agreement on behalf of the Indians. However, the court held that the Indians had a right to any water wasted or not used by the settlers. In *United States v. Ahtanum Irrigation Dist. (Ahtanum II)*, 330 F.2d 897 (9th Cir. 1964), *cert. denied* 381 U.S. 924 (1965), the court reneged on its conclusion as to the power of the Secretary to bargain away Indian rights and denied that particular issue had ever been presented to the court.

50. 236 F.2d at 342.

51. *Id.*

52. 647 F.2d 42 (9th Cir. 1981), *cert. denied* 454 U.S. 1092 (1981). *See infra* note 110.

53. *Id.* at 51.

54. *Id.*

right to reserved water through non-use.⁵⁵

The major issue concerning Indian reserved rights not resolved by the *Winters* decision was the quantification of water rights. In the years before the Supreme Court addressed the issue, the Ninth Circuit held that the quantity reserved included water reasonably necessary for both present and future uses.⁵⁶

The principle that reserved rights must be flexible enough to include future increases necessary to accomplish the purposes of the reservation was upheld in *Arizona v. California*.⁵⁷ The Supreme Court affirmed the Ninth Circuit view, stating that future reserved water rights for Indian reservations would be based on the total practicable irrigable acreage on the reservation.⁵⁸ The court also noted that the doctrine of reserved rights applied to all federal reservations whether created by executive order, statute or treaty.⁵⁹

The development of the reserved rights doctrine has included two significant water rights cases unrelated to Indian claims. These cases concerned land reserved by the federal government for purposes other than Indian reservations. In *Cappaert v. United States*,⁶⁰ the Supreme Court held that the gov-

55. *Id.*

56. *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908). The United States sued a Montana irrigation corporation which was diverting water from a non-navigable stream in which the Blackfeet Indian Reservation had reserved rights. Even though the diversion began before the Indians had exercised their rights and though the corporation had invested \$500,000 in the irrigation project, the court held that the Indians were entitled to the entire flow. The court stated that "[w]hat amount of water will be required for these purposes may not be determined with absolute accuracy at this time, but the policy of the government [is to] reserve whatever water . . . may be *reasonably necessary*, not only for present uses but for future requirements." *Id.* at 832. [Emphasis added.]

57. 373 U.S. 546 (1963). This case, heard under the original jurisdiction of the Court over controversies between states, was an adjudication of all water rights in the Upper Colorado River system.

58. *Id.* at 600-01. "Practicably irrigable acreage" may include irrigation achieved with the use of modern technology. Report from Simon H. Rifkind, Special Master, to the Supreme Court in *Arizona v. California*, 267 (Dec. 5, 1960). See COHEN, *supra* note 13, at 589-90 for a discussion of the difficulties in determining "irrigable acreage."

59. 373 U.S. at 601. All executive order and statutory reservations have implied reservations of water. The method of determining the specific quantity depends upon the purpose of the reservation. *Cappaert v. United States*, 426 U.S. 128 (1976). See text accompanying notes 60-65 *infra*.

60. 426 U.S. 128 (1976). The issue was whether the reservation of Devil's Hole as a

ernment's intent to reserve unappropriated waters could be inferred if the waters were necessary to accomplish the purposes for which the reservation was created.⁶¹ The Court held that preservation of a rare fish was a purpose of the Devil's Hole National Monument and upheld a reservation of water sufficient to sustain them.

In *U.S. v. New Mexico*,⁶² the Supreme Court refined *Cappaert* by holding that water may be impliedly reserved only for the primary purposes of a reservation.⁶³ In setting aside the Gila National Forest, the government was held to have reserved sufficient water for timber maintenance but not for aesthetic, recreational, or wildlife preservation purposes.⁶⁴ The Court noted these purposes were only secondary ones on the reservation.⁶⁵

In *Kimball v. Callahan (Kimball I)*,⁶⁶ the Ninth Circuit held that the Klamath Termination Act did not abrogate the

National Monument under the American Antiquities Preservation Act allowed an implication of federal reserved water rights in unappropriated water. The area was set aside in 1952 by a Presidential Proclamation. The Cappaerts owned adjacent lands and, under a state permit, pumped out so much groundwater that a species of rare fish was endangered. The National Park Service unsuccessfully protested the Cappaerts application for new permits from the state engineer. However, the district court issued a permanent injunction against pumping below the minimum level necessary for sustaining the fish. Upon affirmation by the higher courts, the reserved rights doctrine was extended to groundwater.

61. *Id.* at 139.

62. 438 U.S. 696 (1978). The issue before the Court was whether the reservation of land for the Gila National Forest carried with it reserved rights in the downstream flow of the Rio Mimbres River for recreation, aesthetics, wildlife preservation and stock watering. The case focused on congressional intent behind the acts creating the forest. Fairfax and Tarlock, *No Water For the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L.R. 509, 524-525 (1979).

63. 438 U.S. at 702.

64. *Id.* Water for secondary purposes must be acquired pursuant to state law.

65. *Walton* held that an Indian reservation could have dual purposes with implied reserved water rights to fulfill both purposes. 647 F.2d at 48. The court held that the primary purpose doctrine of *United States v. New Mexico* was inapplicable to Indians for three reasons: treaties and agreements frequently did not articulate the purposes of an Indian reservation; the implied purpose, to allow Indians to live in a self-sufficient manner on the reserved lands, must be liberally construed; and thirdly, most reservations were created for the benefit of the Indians, not for its own benefit as in other types of federal reservations. *Id.*

66. 493 F.2d 564 (9th Cir. 1974). This was an action for declaratory judgment for the purposes of deciding whether Oregon state fish and wildlife regulations applied to Indians exercising treaty rights. It is referred to as *Kimball I* to distinguish it from later litigation between the parties. See *Kimball v. Callahan (Kimball II)*, 590 F.2d 768 (9th Cir. 1979).

treaty rights of members who chose to withdraw from the Tribe.⁶⁷ The court interpreted the treaty to imply a right to hunt and trap as well as the specified right to fish. Members of the Tribe, including those who had withdrawn, retained their rights to hunt, fish and trap on former Indian lands.⁶⁸

III. COURT'S ANALYSIS

A. Jurisdiction

In holding that federal court was the proper forum for Indian water claims, the Ninth Circuit distinguished the facts of *Adair* which differed significantly from both the *Colorado River* and *San Carlos Apache Tribe* decisions. Duplicative, wasteful litigation was not a potential problem in *Adair* because the only issues presented to the federal court were the priorities of federal water rights based on Indian claims.⁶⁹ The Ninth Circuit upheld the lower court's pre trial order declaring actual quantification of the rights to be within the jurisdiction of the State of Oregon.⁷⁰ In addition, the court held that the seven year delay in state proceedings had the effect of a stay, thus eliminating the danger of the federal court duplicating state proceedings.⁷¹

The court also distinguished the secondary factors of the *Colorado River* test. In contrast to the infancy of the federal suit in *Colorado River*, the federal court in *Adair* had already considered and decided complex substantive issues of federal water rights. The court noted that the policy of judicial economy would be frustrated by requiring dismissal and a rehearing at

67. See *supra* note 4.

68. 493 F.2d at 566. This included federal forest lands and privately owned lands on which hunting and fishing was permitted.

69. 723 F.2d at 1404. In *Colorado River*, the federal suit included determination of water rights acquired under state law.

70. 723 F.2d at 1399 (citing the district court Pre Trial Order of November 14, 1977). The Order declared that:

[A]ctual quantification of the rights to the use of waters of the Williamson River and its tributaries within the litigation area will be left for judicial determination consistent with the decree in this action, by the State of Oregon under the provision of 43 U.S.C. § 666 [the McCarran Amendment].

Id.

71. The court pointedly noted that even at the time of appeal, seven years after the state administrative proceedings were initiated by the Water Resources Department, the state's preliminary investigation remained incomplete. *Id.*

the state level.⁷² Additionally, the parties did not raise the issue of the inconvenience of the forum.⁷³

The Ninth Circuit concluded that the government's level of involvement in other Oregon state water proceedings met the government participation standard set out in *Colorado River*.⁷⁴ However, the court found that this one factor standing alone was insufficient to warrant dismissal.

The Ninth Circuit noted that *Colorado River* did not hold that, pursuant to the McCarran Amendment, state courts had exclusive jurisdiction over Indian water claims.⁷⁵ The absence of the exceptional circumstances requiring dismissal,⁷⁶ combined with the limited nature of the federal proceedings, persuaded the Ninth Circuit to hold that the district court acted within its scope of discretion in exercising jurisdiction.

B. *Water Rights*

The Ninth Circuit upheld all of the lower court holdings on the substantive water rights of the parties except its decision not to separately declare the rights of the United States on former reservation lands that it owned.⁷⁷

The Ninth Circuit held that the Treaty of 1864 recognized dual purposes for the reservation and that the district court unnecessarily determined primary and secondary purposes.⁷⁸ The dual purposes were maintenance of traditional hunting, fishing and trapping activities as recognized in *Kimball I*,⁷⁹ as well as agricultural activities.⁸⁰ Consistent with the *Walton*⁸¹ decision, the court found implied reservations of water sufficient to fulfill

72. *Id.* at 1404.

73. *Id.* at 1407 n.12. The district judge's offer to conduct the trial in Medford or Klamath Falls rather than Portland was ignored by the parties. *Id.* Distance between the federal forum and the litigants had no relevance in *Adair*.

74. *Id.* See *supra* note 25.

75. 723 F.2d at 1400.

76. *Id.* at 1403.

77. *Id.* at 1417-18.

78. *Id.* at 1410.

79. See text accompanying note 66.

80. 723 F.2d at 1410.

81. See *supra* note 65.

both purposes.⁸²

In establishing priority dates for the reserved water rights, the court noted that the Klamath Tribe's hunting and fishing rights did not originate with the Treaty of 1864 but rather were confirmed by it.⁸³ Therefore the appropriate priority date for the water rights to support the rights of hunting and fishing was held to be time immemorial.⁸⁴ The date of the treaty was the proper priority date for waters reserved for agricultural purposes since this Tribe's activity did not predate the establishment of the reservation.⁸⁵

The Ninth Circuit clarified the lower court's holding regarding the quantity of water necessary for hunting and fishing.⁸⁶ The instream flow to which the Indians were entitled consisted of the amount needed to maintain a moderate living standard, not necessarily the original level of water.⁸⁷

Rejecting the argument that the Klamath Termination Act⁸⁸ abrogated treaty water rights or subjected allottees to state water law, the court upheld the water rights granted to successors-in-interest of Indian allottees.⁸⁹ The language of the Act directly contradicted the claim that reserved water rights for hunting and fishing ended with the termination of federal supervision.⁹⁰

82. 723 F.2d at 1410.

83. *Id.* at 1414.

84. *Id.*

85. *Id.*

86. "The Indians are still entitled to as much water on the Reservation lands as they need to protect their hunting and fishing rights." 478 F. Supp. at 345.

87. 723 F.2d at 1414-15. The Ninth Circuit reiterated the "moderate living standard" set out by the Supreme Court in *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979). The Court stated that "Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood that is to say, a moderate living." *Id.* at 686. An in-depth exploration of this standard is beyond the scope of this Note, but it is important to consider the limiting effect such a standard has on the quantification of Indian water rights.

88. 25 U.S.C. §§ 564-564w (1976).

89. The General Allotment Act led to the elimination of 25% of the reservation land from tribal ownership. 723 F.2d at 1398. The majority of allotted lands shifted from Indian to non-Indian ownership at the end of the 25 year trust period.

90. 25 U.S.C. § 564m (1976). "Nothing in [the Act] shall abrogate any water rights of the tribe and its members." *Id.*

The court concluded that without unequivocal action by Congress,⁹¹ an intent to abrogate treaty rights could not be imputed to the Act. To deny the implied reservation of water necessary to support hunting and fishing rights, the court would have had to overrule *Kimball I.*⁹² The court declined to undermine that holding by denying water rights to support the hunting and fishing rights which survived termination.

The court also rejected the contention that the Termination Act ought to be interpreted to apply Oregon water laws to the Tribe immediately upon termination.⁹³ The application of Oregon law would have resulted in forfeiture of the Klamath Tribe's unappropriated reserved water rights.⁹⁴ The court concluded this interpretation would directly contradict the stated intent of the Act to prevent abrogation of tribal water rights.⁹⁵

The Ninth Circuit also significantly modified that part of the district court opinion which held that the scope and priority of the government's water rights did not have to be determined because they were coterminous with the rights of the Klamath Indians.⁹⁶ On appeal, the government claimed water rights from two sources. The court affirmed the rights which derived from the government's status as a successor-in-interest to the water rights appurtenant to Indian allotments.⁹⁷ Thus, the government was entitled to sufficient water for all practicably irrigable acreage with a priority date of 1864.⁹⁸ Because the marsh and forest

91. "Once a tribe is determined to be a party to a treaty, its rights under that treaty may be lost only by unequivocal action of Congress." *United States v. State of Washington*, 520 F.2d 676, 693 (9th Cir. 1975) *cert. denied* 423 U.S. 1086 (1976).

92. 723 F.2d at 1411. *See supra* note 66 and accompanying text.

93. The appellants focused on 25 U.S.C. § 564m: "[T]he laws of the State of Oregon with respect to abandonment of water rights by non-use shall not apply to the tribe and its members until fifteen years after the date of the proclamation [of termination]." The state and individual appellants contended that this section ought to be interpreted as applying all Oregon water laws *except* those relating to abandonment and non-use to the Tribe immediately upon termination. 723 F.2d at 1416.

94. The proper interpretation of that section applied Oregon water laws regarding abandonment by non-use to the Indians' rights beginning in 1976, fifteen years from the date the Termination Act became effective. *Id.* at 1416 n.26.

95. *Id.* at 1416. The intent to abrogate treaty rights could not be imputed without explicit statements by Congress. *See Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

96. 723 F.2d at 1418.

97. *Id.*

98. *Id.* at 1419.

contained little irrigable acreage the government also sought to establish itself as successor-in-interest to reserved water rights. The government argued that the water it reserved for the purposes of supporting Indian agriculture and to support Indian treaty rights ought to be available now for the purposes of a forest and wildlife refuge with the original priority date.⁹⁹ Following *U.S. v. New Mexico*, the court rejected this argument. To hold that water rights reserved for one purpose may be altered for a new purpose would be inconsistent with the *Winters* doctrine which states that rights which are an exception to state water law must be limited to the original purposes of the reservation.¹⁰⁰

The Ninth Circuit also rejected any implication that the government would succeed to the water rights reserved for hunting and fishing by holding these treaty rights to be non-transferable.¹⁰¹ Although the maintenance of a natural streamflow might inadvertently benefit the government's purposes, no right to the streamflow passed.¹⁰² Finally, the court held that all the water rights appurtenant to former reservation lands had been established. Since the government possessed irrigation rights with a priority date of 1864¹⁰³ and the Indians had the hunting and fishing rights with a priority date of time immemorial,¹⁰⁴ there were no other rights to be claimed by the government.¹⁰⁵

99. *Id.* The water to which the government was entitled could have been left in-stream but "practicably irrigable acreage" would have still been the standard for quantifying their rights. Special Master's Report, *supra* note 58, at 12.

100. 723 F.2d at 1419, (citing *United States v. New Mexico*, 438 U.S. 696, 700 (1978)). The government's argument in *Adair*, for a new purpose for reserved rights, is of interest to Indian tribes seeking to expand these rights to uses not contemplated at the time of reservation. Although the government lost, a tribe putting forth a similar argument for rights originally reserved for their benefit might achieve a different result. See S. Williams, *The Winters Doctrine Under Attack* published in INDIAN WATER IN THE AMERICAN WEST: A PLANNING AGENDA FOR THE FUTURE ((Conference and Reference Material) American Indian Lawyer Training Program, (November 28-30, 1984)).

101. 723 F.2d at 1419.

102. *Id.*

103. *Id.* at 1417.

104. *Id.* at 1419.

105. 723 F.2d at 1419. The court explicitly left the government two possible alternatives for gaining water rights necessary to maintain the forest and wildlife refuge. First the government could claim an implied congressional reservation of water rights for the new purposes in the Klamath Termination Act. *Id.* The government did not put forth that argument in *Adair*. Secondly, if after quantification, the government's water rights proved inadequate, an appeal to Congress might be possible. In order to establish the Winema National Forest the government acquired non-reservation lands from the public

VI. CRITIQUE

The only questionable holding in *Adair* involves the Ninth Circuit's reliance on *Walton* to allow non-Indian successors to Indian allotments a right to unappropriated reserved water rights.¹⁰⁶ This holding increases the alienability of the lands at the expense of the reserved rights doctrine and the policies of the General Allotment Act.¹⁰⁷

The policies of the General Allotment Act and the reserved rights doctrine support the view that an allottee has only an appropriative right during the trust period. At the end of that period, when the allottee acquires title, the only appurtenant water rights are those acquired by appropriation. Consequently, the only rights the allottee could transfer would be based on the water actually in use at the time title passed.¹⁰⁸

Although it is true that the allottee would receive less money for land sold with an appropriative rather than reserved water right,¹⁰⁹ this is not necessarily a "diminution of Indian

domain in 1893, 1906, 1907 and 1930. 478 F. Supp. at 347-48. The government could claim reserved water rights in those reservations of land. 723 F.2d at 1419.

106. 723 F.2d at 1417. The court states that the Klamath Tribe's appeal on this issue is "foreclosed by our recent decision" in *Walton* without noting that the *Walton* decision relied in part on the district court decision in *Adair*. 647 F.2d at 51. The court utilized the lower court's reasoning that the "non-Indian purchaser, under no competitive disadvantage vis-a-vis other water users may not retain the right to that quantity of water [the reserved right] despite non-use." *Id.* citing *Adair*, 478 F. Supp. at 348-49. In order to conclude that an Indian allottee may transfer a right to unappropriated reserved water the allottee must possess such a right. *Walton* relied on *United States v. Powers* to stand for the proposition that an allottee took an individual share of the tribe's reserved water rights. *United States v. Powers* did not characterize the nature of an allottee's right to reserved water other than to hold that it existed.

107. See *supra* note 8 for an explanation of the policies of the General Allotment Act.

108. *Isham, Colville Confederated Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit*, 43 MONT. L.R. 247, 259, (1982).

109. Clearly, the lands become more valuable with a right to reserved waters included. Despite the restriction on non-Indians as to loss of the right by non-use, the amount of water would still seem to be limited only by the irrigable acreage of the parcel. One commentator noted:

[T]his would allow an aggressive non-Indian purchaser on an over appropriated stream, rights to place the entire parcel under irrigation even if the Indian grantor made no use whatsoever of the land. This creates incentives for prospective purchasers of Indian allotments and an attractive inducement for allottees to sell. The rewards are as great for the idle as they are for the sellers who have shown great dedication to agricul-

rights" which may not be allowed by implication.¹¹⁰ The Ninth Circuit, by persisting in this view, ignores two important points. The intent of the General Allotment Act was to encourage Indian agricultural activities. Under the court's view the sale price of the allottees' lands will never reflect the relative investment of the allottee in appropriating water during the trust period. The second point is that to allow non-Indians to share in tribal reserved water rights can be viewed as a diminution of the rights of the entire tribe.

By upholding the district court on this point, the Ninth Circuit ignores the irony of allowing non-Indians to utilize and compete for a resource reserved to benefit Indians. When the purpose for which the water was reserved is gone, as when Indian lands are sold to non-Indians, the reserved right ought to be extinguished.

V. CONCLUSION

Adair sets a clear standard for the cases which may be adjudicated in federal court when the state court has concurrent ju-

tural development and diligence.

Getches, *Water Rights on Indian Allotments*, 26 S.D.L. REV. 405, 425 (1981). The manner in which these suits arise make it clear that the addition of a right to reserved water is a windfall to non-Indian successors. For the most part, the allotments have already been alienated so any economic advantage will not accrue to the Indian sellers.

110. *Isham*, *supra* note 108, citing *Walton*, 647 F.2d at 50. The Ninth Circuit held in *Walton* that it was a diminution of rights and reversed the lower court's holding that the land ought to be sold with only an appropriative right.

As this Note was going to press, the Ninth Circuit issued its decision on an appeal from the district court on the quantification of rights determined in *Walton II*. On the Tribe's appeal from an unreported district court opinion, the Ninth Circuit reversed and remanded for an opinion consistent with its own specific recalculations. *Colville Confederated Tribes v. Walton*, No. 83-4285 (9th Cir. Jan. 21, 1985).

In recognition of the dangers alluded to in the text accompanying this note, the court emphasized that a very careful investigation had to be made into the degree of diligence used by non-Indian purchasers in perfecting inchoate rights. "Otherwise any remote purchaser could appropriate enough water to irrigate all irrigable acreage with a priority date as of the creation of the Reservation. The reasonable diligence requirement of *Walton II* would be meaningless." *Id.*

In sharply criticizing the district court's disproportionate reduction in the water to be awarded the Tribe for its fishery, the Ninth Circuit stated that this failure to carry out the mandate of *Walton II* specifically granting sufficient water to the fishery was not excused by concerns about overallocation of the stream. "Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users." *Id.* The proper solution was to award the Tribe its full allocation subject to pro rata reduction.

risdiction. Given the fact that Indian water rights claims can be resolved by a limited determination of federal priorities and that state proceedings are notoriously slow and frequently hostile, *Adair* will be an important tool for the tribes which choose to litigate.

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